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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Paul C. Besozzi

July 5, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation - PR Docket 93-144

Dear Mr. Caton:

In accordance with Section 1.1206 of the Commission's Rules, enclosed are two copies of an ex parte presentation made to the Wireless Telecommunications Bureau on this date.

If there are any questions on this matter, please let me know.

Sincerely yours,

Paul C. Besozzi

PCB:lyt
0806/Caton.ltr
Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Paul C. Besozzi

July 5, 1995

David Furth, Esquire
Deputy Chief
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5202, Stop Code 2000C
2025 M Street, N.W.
Washington, D.C. 20554

Re: ***800 MHz SMR Wide Area Licensing***

Dear David:

The attached prior filings (exhibits omitted) address the issue which came up at the recent AMTA Conference. We have also raised this with Dwanda Speight. In light of what was done with the 900 MHz applications, the exact same rationale should apply here.

Sincerely yours,

Paul C. Besozzi

PCB:lyt
0806/DFurth.ltr
Attachments

Stamp - in

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket 93-144 RM-8117, RM-8030; RM-8029
and	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PR Docket No. 93-253

CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC.

In accordance with the Commission's Further Notice of Proposed Rule Making in the captioned proceedings, released November 4, 1994 (hereinafter "Further Notice"), and acting through telecommunications counsel, Dru Jenkinson, Inc., Jana Green, Inc. and Shelly Curttright, Inc. (collectively hereinafter "Licensees") hereby submit their consolidated reply comments.[1/] Licensees are small, female-owned enterprises that already hold 800 MHz Specialized Mobile Radio (hereinafter "SMR") licenses, as well as pending applications for additional such licenses.

[1/] These Reply Comments are timely filed pursuant to the Commission's Order, DA 95-67, released January 18, 1995.

I. THE COMMISSION MUST PROTECT LICENSES ISSUED PURSUANT TO THE PREVIOUSLY FROZEN APPLICATIONS

1. As the Commission well knows, effective August 9, 1994, it unofficially, temporarily suspended the processing of then pending applications for 800 MHz SMR licenses ("Pending Applications"). A number of these Pending Applications, including all of those filed by Licensees, have been on file since the fall of 1993. In November of 1994, however, the Commission decided to resume the processing of the Pending Applications.

2. Licensees' principal concern in this docket remains that any wide-area 800 MHz SMR licensing regime not disenfranchise licenses granted pursuant to the Pending Applications. To Licensees' knowledge, this point was not raised in initial comments by any of the major SMR industry groups, who collectively pressed for, and provided the assistance necessary to finally assure, the processing of the Pending Applications.

A. The Commission Committed To Processing The Pending Applications

3. The Commission's Wireless Telecommunications Bureau has publicly committed to "process the backlog of SMR applications that were pending" on August 9. See Exhibit 1. To retroactively strip the licenses resulting from those Pending Applications of incumbency protections under the proposed wide-area rules would be wholly inconsistent with the Commission's implicit commitment to process the Pending Applications and grant any licenses in accordance with the rules in effect at the time those Pending Applications were filed. Indeed, the applicants must not be

penalized in new rules for delays that were neither their responsibility nor their fault.

B. The Proposed Rules Unfairly Discriminate Against Licenses Granted Pursuant To The Pending Applications

4. To that end, the Commission must correct the unfair discrimination against licenses granted pursuant to the Pending Applications embodied in the following specific provisions of its proposed wide-area rules:[2/]

a. **Proposed Section 90.617(d)** states in part that "SMR licensees licensed on Channels 400-600 on or before August 9, 1994 may continue to utilize these frequencies within their existing service areas." (emphasis supplied). The clear implication is, of course, that a license granted after August 9, 1994 on these channels would, upon the effective date of the rules, be automatically denuded of the right to use these frequencies. The Commission must remedy this potential discrimination by changing the text of the rule to apply to "SMR licensees licensed on Channels 400-600 pursuant to applications on file as of August 9, 1994." Indeed, this would be

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[2/] Interestingly, the text of the Further Notice does not reflect that there would be distinction between licenses granted prior to August 9, 1994 and licenses granted pursuant to the Pending Applications on file as of that date. It may be that these distinctions were not intended since the Further Notice was released prior to the announcement of the Commission's decision to resume processing of the Pending Applications. In either case, the discriminatory provisions in the proposed wide-area rules must be rectified.

consistent with proposed Section 90.663(a)(1) which would require the MTA licensee to afford protection "to all previously-authorized co-channel stations that are not associated with another MTA licensee." (emphasis supplied).

b. **Proposed Section 90.629(e)** states that "SMR Systems licensed after August 9, 1994 will not be eligible for extended implementation periods under this section." (emphasis supplied). This provision would effectively deny (on a retroactive basis) the existing "slow-growth" option to licenses whose issuance was delayed solely because of the Commission's unofficial processing freeze. This provision would detrimentally affect a number of requests for slow-growth authority which Licensees understand to be currently on file.[3/] Again, such a retroactive application of this rule is unwarranted, unfair, and legally questionable. The rule should be modified to state that "SMR Systems encompassing transmitter locations granted pursuant to applications filed after August 9, 1994 will not be eligible for extended implementation periods under this section." (emphasis supplied).

[3/] These include a "slow-growth" request filed on behalf of the Licensees.

c. **Proposed Section 90.677** states, in relevant part, that "[a]n SMR licensee initially authorized on any of the channels listed in Table 4A of Section 90.617 on or before August 9, 1994 may transfer or assign its channel(s) to another entity subject to the provisions of Section 90.153 and 90.609(b)." (emphasis supplied). Again, this language appears to single out for retroactive and discriminatory treatment licenses granted pursuant to the Pending Applications. The licensees of these facilities should not be deprived unreasonably of the protections afforded other incumbents. The language must be clarified to include, "licenses granted pursuant to applications filed on or before August 9, 1994."

II. THE RETROACTIVE DISTINCTIONS FOR PENDING APPLICATIONS ARE LEGALLY SUSPECT

5. Retroactive application of agency regulations is disfavored where it would have the impact projected hereinabove.

> "Retroactive application of policy is disfavored when the ill effects of such application will outweigh the need of immediate application...or when the hardship on affected parties will outweigh the public ends to be accomplished."

Iowa Power and Light Company v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. den., 455 U.S. 907 (1982).

6. The United States Court of Appeals for the District of Columbia Circuit has stated that the relevant factors in determining whether regulatory retroactivity is permitted include "the degree of retroactivity, the need for administrative flexibility and the hardship on the affected parties." Tennessee Gas Pipeline Company v. Federal Energy Regulatory Commission, 606 F.2d 1094, 1116, n. 77 (1979), cert. den., 445 U.S. 920 (1980); *see*, Summit Nursing Home, Inc. v. U.S., 572 F.2d 737, 743 (Ct. Cl. 1978). (Court must compare the public interest in the retroactive rule with the private interests that are overturned by it).

7. Here the Licensees have spent very significant sums of money on engineering, frequency coordination and application fees, not to mention their own uncompensated time and energy. The majority of the Pending Applications of the Licensees are in smaller markets or more rural areas of the country. The major market frequencies are already controlled by the larger SMR providers. To deprive the licenses resulting from these applications of incumbency protections, at the hands of prospective MTA licensees, would effectively render the efforts of the Licensees meaningless.

8. Furthermore, retroactive changes in the SMR licensing rules, which would effectively wipe out investments made in reliance upon the rules in effect at the time the Pending Applications were filed, are prohibited by general principles of administrative law. The U.S. Supreme Court has held that retroactivity in formal rulemaking proceedings is inherently

suspect. Bowen v. Georgetown University Hospital, 488 U.S. 203 (1988). *See also*, Health Insurance Association of America, Inc. v. Donna E. Shalala, No. 92-5196 (May 13, 1994). Retroactive application of a rule requires specific statutory authority for such retroactivity. Bowen, *supra*, at 213. Nothing in either the Communications Act or the Administrative Procedure Act would support a formulation of these wide-area rules to retroactively strip licenses granted pursuant to the Pending Applications of incumbency protections.[4/] As the Supreme Court noted in Bowen:

> It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.

Id., at 208. There is no specific authority, either in Section 303(r) of the Act, 47 U.S.C. § 303(r), governing rulemaking powers, nor in the radio licensing provisions applicable to SMR licenses, Sections 307 to 309 and Section 332, 47 U.S.C. §§ 307-309, 332, to

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[4/] In Maxcell Telecom Plus, Inc. v. F.C.C., 815, F2d 1251 (D.C. Cir. 1987), which was decided before Bowen, the D.C. Circuit was able to discern sufficient Congressional intent in the adoption of the lottery statute, 47 U.S.C. § 309(i), to justify retroactive imposition of the lottery procedures for selection of cellular telephone applicants that had originally been filed in anticipation of comparative hearings. 815 F.2d at 1555. This is a limited exception because of the specific Congressional intent to employ lottery procedures to eliminate mutually-exclusive application backlogs, *inter alia*. Id. Moreover, there was no imposition of any obligation or liability nor the deprivation of any rights as a result of the change from comparative hearing to lottery selection procedures. By contrast, the Licensees have incurred substantial costs in preparation of applications that could be granted on a first-come, first-served basis under rules in effect at the time they were filed. There was no expectation that those costs would be rendered worthless by failing to protect licenses issued from subsequently granted MTA-based licenses.

justify the retroactive discrimination against applicants that have filed their applications based upon an expectation of protection from entities licensed under a completely new set of wide-area rules implemented years after their applications were filed.

9. In addition, such retroactive application of rules is specifically prohibited by the Administrative Procedure Act. The APA specifically defines a "rule" as an agency statement "of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis supplied). *See also* Bowen, supra, 488 U.S. at 218 (J. Scalia Concurring). GN Docket 93-252 is by definition a notice and comment rulemaking proceeding. Thus, retroactive changes in the rules depriving licenses granted pursuant to the Pending Applications from incumbency protections would amount to what Justice Scalia characterized as "secondary retroactivity", *i.e.*, "altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule..." Id., 488 U.S. at 220 (J. Scalia Concurring). Retroactive application of rule changes strip the Pending Applications of incumbency protections; thereby imposing a substantial regulatory burden, with attendant financial costs, upon parties who had made financial decisions in reliance upon FCC rules and policies in effect when their Pending Applications were filed. Such retroactivity is prohibited by the APA.

III. THE COMMISSION MUST BE CONCERNED ABOUT FAIRNESS TO SMALL ENTERPRISES

10. The Commission has conceded that its wide-area auction proposal for 800 MHz SMR will "potentially affect numerous small entities already operating 800 MHz SMR systems on frequencies designated for licensing on a wide-area basis." Further Notice, Appendix B, Page 2. The proposal, the Commission admits, also could affect "small entities seeking initial licenses in the 800 MHz SMR service." Id. The Commission cannot further exacerbate this problem by denying incumbency protections to entities like Licensees who are small enterprises that filed their Pending Applications nearly a year and a half ago in good faith reliance on the existing rules, only to be later caught by an unannounced processing freeze imposed solely to purportedly address an application backlog. This form of regulatory "sleight of hand" is blatantly inconsistent with the Commission's recent decision to process the Pending Applications. A regulatory system for licensing wide-area SMR systems that includes such disparately discriminatory distinctions based solely on the August 9 date cannot be implemented.

IV. KEY CONGRESSIONAL FIGURES HAVE EXPRESSED SIMILAR CONCERNS ABOUT THE IMPACT ON SMALL ENTERPRISES

11. Licensees note that concerns over small businesses potentially affected by a wide-area scheme have generated legitimate inquiry from the leadership of the U.S. Senate Committee on Commerce about the entire scheme to auction 800 MHz SMR spectrum. See Exhibit 2. In their Initial Comments, Licensees

supported the concept of a wide-area SMR licensing process, so long as the interests of small entities could be adequately protected, especially those who long ago had sought a modest stake in the SMR industry. Licensees' support is consistent with the concerns raised by the Senate leadership. The proposal to "distinguish" between licenses granted before August 9 and licenses resulting from and applications on file as of that date can only serve to buttress those concerns.

V. CONCLUSION

12. The Commission must afford licenses granted pursuant to the Pending Applications which were on file prior to August 9, 1994, the same incumbency protections proposed for the licenses granted prior to the August 9, 1994 date. To do otherwise imposes unfair and unjustified disparate regulatory treatment which is arbitrary and capricious.

Respectfully submitted,

DRU JENKINSON, INC.
JANA GREEN, INC.
SHELLY CURTTRIGHT, INC.

By: _____

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Date: February 10, 1995

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the	)	
Commission's Rules to Facilitate	)	PR Docket No. 93-144
Future Development of SMR	)	RM-8117; RM-8030;
Systems in the 800 MHz	)	RM-8029
Frequency Band	)	
	)	
and	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	
Competitive Bidding 800 MHz SMR	)	

To: **The Commission** (Ex Parte Presentation)

SUPPLEMENTAL CONSOLIDATED REPLY COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC., AND SHELLY CURTTRIGHT, INC.

In accordance with the Commission's Further Notice of Proposed Rule Making in the captioned proceedings, released November 4, 1994 (hereinafter "Further Notice")[1/], and acting through telecommunications counsel, Dru Jenkinson, Inc., Jana Green, Inc., and Shelly Curttright, Inc. (collectively hereinafter "Licensees") hereby submit these supplemental consolidated reply comments. On January 5, 1995, Licensees filed Consolidated Initial Comments. On February 10, 1995, Licensees filed Consolidated Reply Comments. Due to recently-discovered information and new precedent, Licensees now files these Supplemental Consolidated Reply Comments. Licensees are small, female-owned enterprises that already hold 800 MHz Specialized Mobile Radio (hereinafter "SMR") licenses, as well as pending applications for additional such licenses. Copies have been filed under 47 C.F.R. § 1.1206.

I. TREATMENT OF INCUMBENT SYSTEMS

1. As noted in their Consolidated Initial Comments, Licensees generally support the Commission's initiative to implement a new framework for the licensing of wide-area 800 MHz

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[1/] In the matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band (Further Proposed Rulemaking), FCC 94-271 (released November 4, 1994)("FNPRM").

SMR systems, However, the Commission has previously (and properly) concluded that mandatory relocation of incumbent licensees is impracticable and therefore not in the best interest of the SMR industry. Thus, in the FNPRM, the Commission appropriately reasoned:

> "Based on the record in this proceeding and the numerous comments regarding the Nextel proposal, we tentatively conclude that incumbent systems should not be subject to mandatory relocation to new frequencies pursuant to Nextel's proposed 'band-clearing' approach. We are concerned that mandatory relocation could impose significant costs and disruption on incumbent licensees and their customers. Even if we limit mandatory relocation to instances where there are substitutable channels available and require the costs of relocation to be paid by the MTA licensee, we are also concerned that mandatory relocation would inevitably draw the Commission into disputes between licensees over substitutability of channels, compensable costs, and other related issues. In addition, relocation is likely to be complicated as a practical matter by a lack of sufficient alternative frequencies in many markets to accommodate all incumbents in the MTA blocks on a one-to-one basis. If this is the case, mandatory relocation could require us to become involved in decisions about which incumbents are required to relocated and which are not."

FNPRM, supra, at pp. 21-22, ¶ 34.

2. The Commission must not change its position regarding mandatory relocation because there has been no substantive change in the facts supporting that conclusion. However, Licensees have heard from responsible SMR industry sources that the Commission is considering reversal of its position, in order to allow mandatory relocation of incumbent licensees by the MTA wide-area licensee. As the Commission's underlying rationale for previously rejecting mandatory relocation remains valid, the Commission should not now do a regulatory about-face. Indeed, in light of the practical realities of the SMR industry, adoption of a new regulatory framework for the licensing of wide-area 800 MHz SMR systems with mandatory relocation by the MTA wide-area licensee would serve to restrict rather than foster competition.

3. Adoption of a new regulatory framework for the licensing of wide-area 800 MHz SMR systems with mandatory relocation by the MTA wide-area licensee is only likely to enhance the dominant SMR market position already held by Nextel, Inc. and the other companies it controls ("Nextel"). This would be inconsistent with the Commission's clear

policy in favor of competition.

4. In the FNPRM, the Commission considered the possibility of mandatory relocation of the incumbent licensee provided that the MTA wide-area licensee would "*demonstrate the availability of fully comparable alternative frequencies*". FNPRM, supra, at p. 22, ¶34 (emphasis added). At this juncture, only Nextel can satisfy this demonstration. Over the last few years through merger and acquisition of the channel positions of OneComm, Dial Call, Motorola, and numerous other significant SMR operations, Nextel has established a nationwide-footprint with an associated channel inventory of monopolistic proportion. Similarly-known is the fact that the 800 MHz SMR industry is mature to the extent that all SMR frequencies have either been licensed or are subject to applications presently on file and awaiting processing. Accordingly, only Nextel, by virtue of its large cache of channel positions, would be able to "*demonstrate the availability of fully comparable alternative frequencies*". Therefore, adoption of mandatory relocation would only serve the interests of Nextel; Nextel would be the only potential MTA wide-area licensee which would have the requisite channel position to utilize mandatory relocation. As a result, a regulatory framework which provides for mandatory relocation would serve to advantage only Nextel and bolster the concentration of power of Nextel's channel position in the industry. However, public policy mandates that the Commission foster competition rather than a monopoly.

5. The logical follow-on is that, since mandatory relocation subject to availability of alternate channels is available only to and serves only to advantage Nextel by virtue of Nextel's monopolistic channel position in the industry, entry into the competitive bidding process for other potential MTA wide-area licensees would also be restricted. In a majority of the MTAs, Nextel controls or will control the majority of the SMR channels. Therefore, no other company can realistically bid for these MTA wide-area licenses because insufficient alternative channels exist to relocate Nextel through mandatory relocation. In contrast, in those same MTAs, Nextel has sufficient alternative channels to relocate incumbent licensees.

Therefore, Nextel can use mandatory relocation as both a *shield* and a *sword.*

6. Mandatory relocation would serve to defeat the Commission's public interest objectives. In contemplating the near-term auction of MTA wide-area licenses, the Commission believes that "competitive bidding will further the public interest objectives stated in section 309(j)(3) by promoting rapid development of service, fostering competition, *recovering a portion of the value of the spectrum for the public*, and encouraging efficient spectrum use." (Letter from Chairman Reed E. Hundt to Senator Robert Packwood, dated March 10, 1995, at p. 3, Exhibit A attached). On March 7, 1995, the Commission lifted the bar to the wireline entry into the SMR industry to foster increased competition. However, if only Nextel can qualify to utilize mandatory relocation, then wireline companies are competively disadvantaged to establish themselves as MTA wide-area licensees. As a result, wireline companies, as well as smaller entrepreneurs similarly situated, will be disinterested in submitting competitive bids for the MTA wide-area licenses. Adoption of mandatory relocation will thereby result in fewer bidders (perhaps only Nextel) which will drastically reduce rather than recover *a portion of the value of the spectrum for the public.*

7. The Commission's prior statements in favor of enhanced competition and of economic over regulatory forces support voluntary rather than mandatory relocation of incumbent licensees by MTA wide-area licensees. In the FNPRM, the Commission stated: "We therefore tentatively conclude that decisions regarding relocation should be left to the parties and the marketplace." FNPRM, supra, at p. 22, ¶ 34. Thereafter, and most recently, Chairman Reed Hundt, in speaking of the proposed SMR regulatory framework in his letter to Senator Robert Packwood on March 10, 1995, at p. 1 stated, that:

> "The effort seeks to enhance competition among mobile service providers, promote development and implementation of new and innovative service offerings, and ensure that economic forces, *not regulatory decree*, define the marketplace." (emphasis added).

8. Voluntary relocation is accomplished through economic forces. In contrast,

defining the marketplace by mandatory relocation is through *regulatory decree*. Accordingly, by its own reasoning and statements, the Commission must support voluntary rather than mandatory relocation.

9. Licensees' position on this issue is consistent with public policy and the Commission's previous conclusions. The Commission should adhere to its initial reasoning and findings on this subject. The Commission should not be swayed by alternatives that clearly would have the greatest detrimental impact on incumbent licensees and on competition.

II. THE AUGUST 9, 1994 DEMARCATION

10. In their Consolidated Reply Comments, the Licensees noted the inherent unfairness of exempting licenses issued pursuant to applications filed long-prior to August 9, 1994, but granted subsequent thereto, from the protections of incumbency and other key elements of the revised Part 90 Rules. Licensees (and others who filed Reply Comments) are steadfast in this position.

11. Recently, the Commission itself recognized the inequity of such a situation. In the Matter of Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated July Areas In the 896-901 MHz and the 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, FCC 95-159, released April 17, 1995. Therein, the Commission concluded as follows:

> "Finally, our delays in processing secondary site applications in the 900 MHz SMR service appear to have produced an inequitable result for applicants who otherwise would have been entitled to protection under the CMRS Third Report and Order. Therefore, we require all MTA licensees to provide complete co-channel protection to all sites for which applications were filed on or before August 9, 1994. Secondary sites based on applications filed after August 9 will not be afforded such protection, however."

Id., at p. 21, ¶53. Precisely the same rationale applies with respect to the discrimination, based merely on a grant date, especially where the delay was engendered by an unofficial processing freeze. As requested in their Consolidated Reply Comments, the Licensees urge that

this disparity in treatment be removed.

III. CONCLUSION

12. The Commission should not, by regulatory fiat, impose mandatory relocation which promotes a monopoly. The Commission's prior announced position of voluntary relocation is in accord with public policy to promote competition. In addition, in accordance with precedent, 800 MHz SMR licenses issued pursuant to applications filed prior to August 9, 1994, should be treated as incumbents under the revised rules.

Respectfully submitted,

DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC.

By: _____

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Their Attorney

Date: May 1, 1995

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